A

CHONG SONG

v.

UMA DEVI V KANDIAH

B

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: N-02-984-2001]

C

22 NOVEMBER 2010

LAND LAW: *Sale of land - Transfer - Whether valid - Factors to consider - Evidence adduced by the parties - Effect of*

D

LAND LAW: *Transfer - Fraud - Whether the memorandum of transfer was fraudulently executed - Evidence adduced - Factors to consider - Effect of - Whether it was a void instrument*

LAND LAW: *Power of Attorney - Rights and interest on grant of - Irrevocable Power of Attorney granted by plaintiff to the 2nd defendant - Meaning of - Effect of*

E

LAND LAW: *Administration - Land Revenue - Late payment of stamp duty on Power of Attorney and sale and purchase agreement - Effect of - Whether that affected validity and admissibility of documents - Effect of*

F

LAND LAW: *Sale of land - Fraud alleged - Evidence adduced - Effect of - Whether proven by the plaintiff - Whether 3rd and 4th defendants were innocent purchasers of land - Whether 3rd and 4th defendants' knowledge of a charge existing on land showed that they were part of a fraudulent act*

G

LAND LAW: *Title - Sale and purchase of property - Whether 3rd and 4th defendants acquisition of title to land came within the proviso of s. 340(3) National Land Code - Effect of - National Land Code, s. 340(3)*

H

LAND LAW: *Title - Indefeasibility of title - Whether 3rd and 4th defendants had acquired indefeasible title to land - Whether they came within s. 340(3) National Land Code - Effect of - National Land Code, s. 340(3)*

I

EVIDENCE: *Standard of proof - Fraud - Whether learned judge misdirected himself on standard of proof - Whether it affected outcome of the case*

The respondent ('plaintiff') was the original registered proprietor of a piece of land in Johor ('land'). A charge and an irrevocable Power of Attorney was granted by the plaintiff to the 2nd defendant in respect thereto. The appellants ('3rd and 4th defendants) entered into a sale and purchase Agreement with the 2nd defendant in April 1996 and the land subsequently registered in the 3rd and 4th defendant's names. The plaintiff sued the defendants for a declaration that she still was the registered proprietor of the land and for an order that the sale and transfer of the land to the 3rd and 4th defendants had been done fraudulently, thus rendering it null and void. In the High Court, the plaintiff's claim was allowed. The 3rd and 4th defendants thus brought this appeal.

Held (allowing the appeal with costs)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

(1) The sale and transfer of the land to the 3rd and 4th defendants could be validly executed by the 1st defendant in her capacity as an attorney acting on behalf of the chargor, the plaintiff. The sale and transfer of the land by the chargee and attorney to the 3rd and 4th defendants was valid, effective and proper. (para 20)

(2) There was no issue of a void or insufficient instrument as the memorandum of transfer had been executed by the 1st defendant as the donee of an irrevocable Power of Attorney. (para 20)

(3) The late payment of stamp duty on the Power of Attorney and the sale and purchase agreement between the plaintiff and the 1st defendant had not affected the validity and admissibility of the documents. (para 20)

(4) There was no evidence to show any inkling of a fraudulent act or omission by the 3rd and 4th defendants. They had been innocent purchasers of the land. In any event, mere knowledge of the existence of a charge could not reasonably be inferred as part of a fraudulent act. (para 20)

(5) At the trial in the High Court, two advocates and solicitors, SP3 and SP4, had given evidence for the defendants and confirmed the execution of the relevant documents pertaining to the transactions over the land and the transfer of the same to the 3rd and 4th defendants. (para 20)

(6) The evidence at the trial had clearly shown that the facts of this case did not fall within the exceptional circumstances envisaged under s. 340(2) of the National Land Code. In any event, the 3rd and 4th defendants' acquisition of the title and interest to the land had been well protected by the proviso to s. 340(3) of the NLC. The 3rd and 4th defendants were purchasers in good faith and for valuable consideration, which consideration had been paid in full. Thus the 3rd and 4th defendants had in law, upon being registered as proprietors, acquired an indefeasible title and interest to the land. (para 20)

(7) The learned trial judge had erred when he made his decision based on the wrong standard of proof in the factual matrix of the case where fraud was specifically pleaded. Such an error was a serious misdirection and had affected the outcome of the case. (para 21)

Bahasa Malaysia *Translation Of Headnotes*

Pihak responden ('plaintif') merupakan pemilik berdaftar sebidang tanah di Johor ('tanah'). Pihak plaintif telah menyempurnakan suatu gadaian dan surat kuasa wakil yang tidak boleh dibatalkan berkenan dengan tanah tersebut berpihak kepada defendan kedua. Pada bulan April 1996, pihak perayu ('defendan ketiga dan keempat') telah memasuki suatu perjanjian jualbeli dengan defendan kedua dan tanah tersebut telah didaftarkan atas nama defendan ketiga dan keempat. Plaintif telah membawa suatu tindakan terhadap defendan-defendan untuk suatu deklarasi bahawa beliau masih merupakan pemilik berdaftar tanah tersebut dan suatu perintah bahawa penjualan dan pemindahan tanah tersebut kepada defendan ketiga dan keempat telah dilakukan secara fraud atau penipuan menjadikan transaksi tersebut batal dan tidak sah. Di Mahkamah Tinggi, tuntutan plaintif telah dibenarkan. Defendan ketiga dan defendan keempat kini merayu terhadap keputusan tersebut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mohamed Apandi Ali HMR menyampaikan penghakiman mahkamah:

(1) Penjualan dan pemindahan tanah tersebut kepada defendan ketiga dan keempat telah dilaksanakan secara sah oleh defendan pertama dalam keupayaannya sebagai peguam mewakili penggadai plaintif. Penjualan dan pemindahan tanah tersebut oleh pemegang gadaian dan penerima surat kuasa wakil kepada defendan ketiga dan keempat adalah sah, efektif dan teratur.

(2) Memorandum pindah yang telah dilaksanakan oleh defendan pertama telah ditandatangani oleh beliau sebagai pemegang surat kuasa wakil yang tidak dapat dibatalkan maka tiada isu berkenaan ketidaksahannya.

(3) Pembayaran lewat duti setem keatas surat kuasa wakil dan perjanjian jualbeli antara plaintif dan defendan pertama tidak memberi kesan kepada keesahan dan kebolehterimaan dokumen-dokumen tersebut.

(4) Bukti-bukti yang dikemukakan gagal untuk menunjukkan sebarang tindakan secara fraud atau peninggalan tindakan di pihak defendan ketiga dan keempat. Mereka merupakan pembeli tanah tersebut yang tidak bersalah. Dalam apa jua keadaan pun, hanya mempunyai pengetahuan mengenai gadaian tidak boleh dianggap sebagai sebahagian tindakan fraud atau penipuan.

(5) Di perbicaraan, dua orang peguambela dan peguamcara yakni SP3 dan SP4, telah memberikan keterangan untuk pihak defendan-defendan dan mengesahkan bahawa kesemua dokumen-dokumen relevan berkenaan tanah tersebut dan pemindahan tanah tersebut kepada defendan ketiga dan keempat telah ditandatangani.

(6) Keterangan yang dikemukakan di perbicaraan telah menunjukkan secara jelas bahawa fakta kes ini tidak terjatuh di bawah "exceptional circumstances" yang dimaksudkan di bawah s. 340(3) Kanun Tanah Negara ('KTN'). Dalam apa jua keadaan pun, pemerolehan defendan ketiga dan keempat akan hakmilik dan kepentingan di dalam tanah tersebut telah dilindungi oleh proviso kepada s. 340(3) KTN. Defendan

A ketiga dan keempat merupakan pembeli secara suci hati yang telah membayar balasan yang bernilai, yang mana telah dibayar secara penuh. Maka defendan ketiga dan keempat di sisi undang-undang, setelah didaftar sebagai pemilik berdaftar, telah memperolehi hakmilik yang tidak boleh disangkal dan
B kepentingan ke atas tanah tersebut.

(7) Yang arif hakim bicara telah melakukan kesilapan apabila beliau membuat keputusan berdasarkan standard atau tahap pembuktian yang salah dalam kes ini dimana penipuan atau
C fraud telah diplidkan. Kesilapan sedemikian merupakan suatu salah arahan dan telah memberi kesan kepada keputusan kes.

Case(s) referred to:

Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***
D

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

Malayan Banking Bhd v. Agencies Bureau Sdn Bhd & Ors [1982] CLJ 66; [1982] CLJ (Rep) 217 FC ***(refd)***

Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor [2003] 2 CLJ 86 FC ***(refd)***
E

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***

F *Saminathan v. Pappa [1980] 1 LNS 174 PC* ***(refd)***

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(refd)***

Legislation referred to:

National Land Code, s. 340(2), (3)

Stamp Act 1949, ss. 51, 52, 63
G

For the appellants - RR Sethu (Cha Kian An with him); M/s Sebastian Cha & Co

For the respondent - Hj Sulaiman (R Kengadharan & R Prabhakaran with him); M/s R Kengadharan & Co

H *[Appeal from High Court, Malaya; Seremban; Civil Suit No: 22-61-1996]*

Reported by Sharmini Pillai

I

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] This is a dispute regarding ownership of a piece of land held under HS(M)11380 MLO 1026 in the Mukim of Sedenak, Kampung Ayer Manis, Daerah Johore Bahru, Johore (hereinafter "the land"). It is registered under the names of the appellants (hereinafter "the 3rd and 4th defendants"). The respondent (hereinafter "the plaintiff") was the original registered proprietor had sued the 3rd and 4th defendants, together with two other defendants (hereinafter "the 1st and 2nd defendants") for a declaration that she is still the registered proprietor and pray, for among other things, that the 3rd and 4th defendants return the original title deed to her and that for an order that the sale and transfer of the land was executed in a fraudulent manner and was not effective in law, rendering it null and void.

[2] After a full trial, the plaintiff's claim was allowed. The 3rd and 4th defendants now appeals to us.

Facts Of The Case

[3] Briefly, the facts are as follows. The plaintiff is the original registered proprietor of the land. The 2nd defendant is the chargee of the land and a holder of a power of attorney granted by the plaintiff to the 2nd defendant in respect of the land. The 1st defendant is the husband of the 2nd defendant.

[4] The 3rd and 4th defendants are husband and wife who purchased the land and become the registered proprietors of the land.

[5] The pertinent facts and the relevant chronology of events, as disclosed by documentary evidence are as follows:

(i) The plaintiff charged the land to the 2nd defendant on 2 June 1994. As per Form 16A the charge was created as security for a loan in a sum RM105,000 taken from the 2nd defendant;

(ii) A Power of Attorney granted by plaintiff to the 2nd defendant was dated 20 October 1994. The Power of Attorney empowered the 2nd defendant to sell the land and for that

A purpose to sign and execute all transfers and other instruments necessary. The Power of Attorney is an irrevocable one, given for valuable consideration received in the sum of one hundred thousand ringgit by way of a Sale and Purchase Agreement in respect of the land. The Power of Attorney was registered
B with the Kuala Lumpur High Court on 9 November 1994, *vide* registration No. 44243/94, and subsequently registered with the Land Office Johor Bahru on 21 May 1996;

(iii) The 3rd and 4th defendants executed a Sale and Purchase
C Agreement of the land with the donee of the Power of Attorney (the 2nd defendant) on 20 April 1996;

(iv) Form 14A for purposes of transferring the land to the 3rd and 4th defendants, was executed on 25 April 1996.

D **[6]** In her pleadings, the plaintiff averred that on or before May 1994 the 1st defendant and the 2nd defendant had through misrepresentation, deceit and fraud had caused her to execute a charge and given the Power of Attorney as the chargor of the land. The plaintiff also averred that it was a friendly loan
E transaction whereby the plaintiff had borrowed a sum of RM75,000 from the 1st and 2nd defendants. The plaintiff further averred that she had up to October 1994 paid RM13,125 towards repayment of the loan and had requested for time to pay the outstanding balance.

F

[7] In respect of the 3rd and 4th defendants, the plaintiff alleged that they are not *bona fide* purchasers of the land, as they were aware that the land was a charged land and thus could only be transacted in accordance with the provisions of the National Land
G Code. The plaintiff further alleged that the 3rd and 4th defendants had colluded with the 1st and 2nd defendants in the sale transaction and transfer of land with the intention of denying the rights of the plaintiff.

H **[8]** The 1st and 2nd defendants denied the allegations and claims of the plaintiff. The 1st and 2nd defendants averred that the land was bought *via* a Sales and Purchase Agreement dated 30 May 1994 in consideration of a purchase sum of RM100,000 and the said sum was paid in full on the date of execution of the
I Sale and Purchase Agreement, *via* Bank of Commerce Cheque No. 658002.

[9] The 3rd and 4th defendants also denied any knowledge of all the allegations by plaintiff and averred that they purchased the land *via* a Sale and Purchase Agreement executed on 20 April1996 with the 2nd defendant in her capacity as the donee to the Power of Attorney given by the plaintiff. The 3rd and 4th defendants claimed that they have paid the purchase price in full and are *bona fide* purchasers of the land, and as such the title as registered in their names is an indefeasible title.

[10] The trial at the High Court commenced on 5 September 2000. After hearing the evidence of the plaintiff and five defence witnesses (including two advocate and solicitors who dealt with the execution of the relevant documents pertaining to the transactions leading to eventual registration of the title in the names of the 3rd and 4th defendants), the learned trial judge gave his decision, in favour of the plaintiff, on 17 October 2001.

Grounds Of Judgment Of The High Court

[11] The learned trial judge wrote his grounds of judgment on 12 February 2006. The learned trial judge had initially correctly identified the core issue of the case, by stating as follows:

> Isu utama yang timbul di dalam kes ini adalah sama ada terdapat salah nyata, tipu muslihat dan fraud yang telah dilakukan oleh Defendan Pertama dan Kedua yang mengakibatkan plaintif telah memberi Surat Kuasa Wakil dan geran asal tanah serta telah menggadaikan tanah tersebut kepada Defendan Kedua. Jika ada, adakah ia telah dibuktikan?

[12] However, with due respect, the learned judge had misconceived the standard of proof, when he held that when a plaintiff pleaded fraud, the standard of proof is on a balance of probabilities. The learned judge in his grounds of judgment wrote:

> Sememangnya telah menjadi prinsip undang-undang yang mantap bahawa sekiranya plaintif memplidkan fraud, taraf bukti yang diperlukan untuk membuktikannya ialah atas imbangan kebarangkalian. Prinsip ini telah diperkatakan dengan jelas di dalam kes *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241 di mana Mahkamah Persekutuan memutuskan:
>
> > Mahkamah bersetuju dengan Mahkamah Rayuan bahawa taraf bukti yang diperlukan untuk membuktikan pemalsuan dalam kes-kes sivil ialah atas imbangan kebarangkalian.

[13] As noted in the very quotation from the *Adorna Properties*'s case, as quoted by the learned trial judge, such standard of proof is in respect of forgery. It is a different kettle of fish from fraud. Despite identifying the core issue of the case, the learned trial judge unfortunately started off on a wrong footing.

[14] It is trite law, that has been held and upheld by the apex courts in this country that the standard of proof for fraud, in civil cases, is beyond reasonable doubt. This can be seen in the following cases:

[15] *Saminathan v. Pappa* [1980] 1 LNS 174; [1981] 1 MLJ 121 when the Federal Court's ruling that in fraud cases, the burden of proof must be proved beyond reasonable doubt was upheld by the Privy Council.

[16] *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134, where the Supreme Court held that:

> We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture *(Narayanan v. Official Assignee, Rangoon; Saminathan v. Pappa)*. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the Court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case. If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt.

[17] *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229, where the Federal Court while referring to the Privy Council's decision in *Saminathan*'s case at p. 235 held that:

> Clearly therefore, the Privy council has found it fit to follow the *Atkin Test* concerning the standard of proof for fraud in civil proceedings in Malaysia.
>
> In the circumstances, the Court of Appeal in the instant case is misconceived in holding that the proper test to establish fraud is on the balance of probabilities. In our view, the Court of Appeal has obviously misdirected itself in rejecting the proposition of law applied in *Saminathan v. Pappa (supra)* that the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt

which has been consistently applied by the courts in Malaysia. We see no reason to disturb that trend. That being the position, the answer to the first question postulated has to be in the negative.

[18] The Federal Court in *Yong Tim*'s case also took the opportunity to draw the distinction between the standard of proof in "forgery" and "fraud" cases. The Federal Court particularly makes references to the infamous *Adorna Properties*'s case. The relevant part of the judgment reads as follows:

Given the position taken by the Court of Appeal, it is, we think, appropriate to examine in some detail the two cases cited above. In *Adorna Properties Sdn Bhd,* the Federal Court said *inter alia*:

> For proof of forgery, such as the one under appeal, whether the standard of proof is on a balance of probabilities or beyond reasonable doubt?
>
> The same arguments which the parties had put before both the High court and the Court of Appeal were again argued before us. The High Court held that forgery must be proved beyond reasonable doubt, while the Court of Appeal held that it should be on a balance of probabilities. For the reasons given by the court of Appeal we entirely agree that the standard of proof required to prove 'forgery' in civil cases is one on a balance of probabilities.

It is quite obvious that the Federal Court in *Adorna Properties Sdn Bhd* was concerned with forgery. That was the central issue in dispute between the parties involved. In this regard, the Federal Court adopted the approach taken by the court of Appeal in the same case as to the requisite standard of proof in establishing forgery. Therein, the Court of Appeal said as follows:

> Now, it is a general rule of the common law that, in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities. The general rule finds expression in the judgment of the High Court of Australia (Barwick CJ, Kitto, Taylor, Menzies JJ in *Rejfek v. McElroy* [1965] 112 CLR 517, a case of fraudulent misrepresentation).
>
> The common law of Malaysia has provided an exception to this rule in one case alone. Where fraud is alleged in civil proceedings, it must be proved beyond a reasonable doubt. The exception rests upon the following observation of Lord Atkin in *Narayanan Chettyar v. Official Assignees, Rangoon* AIR [1941] PC at p. 95:

A There are other difficulties in the plaintiffs' way which have been sufficiently considered in the judgments of the High Court. *Fraud of this nature, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt.* The High court were justified in holding that the trial judge's finding was largely based on suspicion and conjecture. (emphasis added)

This passage was applied by Rose CJ in the Singapore High Court in *Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society) v. Koh Kim Guan* [1959] MLJ 173 which in turn was applied by the former Federal court in *Tan Chye Chew & Anor v. Eastern Mining & Metals Co. Ltd* [1965] 1 MLJ 201. It has also been applied by our courts in later cases. See for example, *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors* [1983] 1 MLJ 81, per Abdul Hamid FCJ (as then was) at p. 84.

The Privy Council has recognized the departure made by our common law upon the question of proof of fraud in Civil proceedings. In *Saminathan v. Pappa* [1981] 1 MLJ 121 at p. 126, Lord Diplock when delivering the advice of the Board said that.

The onus of proof of fraud in Malaysia is proof beyond reasonable doubt.

The Court of Appeal went on the state that the *Atkin Test* established in *Narayanan Chettyar (supra)* was not followed by the High Court of Australia in *Rejfek v. McElroy (supra)*. It then made the observation that proof of forgery in civil proceedings, unlike fraud, came within the general rule ie, that it need only be established on a balance of probabilities. This observation, as we have said earlier, was accepted by the Federal Court in *Adorna Properties Sdn. Bhd*. Clearly, fraud was not the issue before the Federal Court in that case. Where fraud has been raised, we agree with the Court of Appeal in *Adorna Properties Sdn Bhd*, that the Malaysian courts have consistently applied the *Atkin Test*.

[19] The learned trial judge in this case, also held that the transfer of title of the land to the 3rd and 4th defendants was not legal as the instrument used was insufficient. This is one of the circumstances that make the title defeasible, under s. 340(2) of the National Land Code. Besides the purported reliance on the cases of *Kimlin Housing Development Sdn Bhd. v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274 and *M & J Frozen Food*

Sdn. Bhd. & Anor v. Siland Sdn. Bhd. & Anor [1994] 2 CLJ 14; the learned trial judge did not elaborate as to why the registration of the title to the 3rd and 4th defendants were unlawfully acquired. The learned judge also make an issue over the alleged late payment of stamp duty on the Power of Attorney and the Sale and Purchase Agreement between the plaintiff and the 1st defendant. The learned judge also held that in view of the existence of a charge on the land, it gave rise to suspicion on the transparency of the transaction and went on to conclude that the 3rd and 4th defendants are not *bona fide* purchasers of the land.

Our Findings

[20] Upon perusal of the evidence adduced at the trial, namely *vide* oral and documentary evidence and upon hearing submissions by both counsel, we make the following findings:

(a) The sale and transfer of the land to the 3rd and 4th defendants can be validly executed by the 1st defendant in her capacity as an attorney acting on behalf of the chargor, plaintiff. The fact that the Power of Attorney was duly and voluntarily executed by the plaintiff is not in dispute. This was even admitted by the plaintiff in her testimony at the trial. The sale and transfer of the land by the chargee and Attorney, to the 3rd and 4th defendants was valid, effective and proper. The facts in this case is almost similar to the case of *Melantrans Sdn. Bhd & Anor v. Carah Enterprise Sdn. Bhd.* [2003] 2 CLJ 86, where the Federal Court, *inter alia* held that:

> We agree with *Kimlin* that Part XVI of the NLC deals with the rights and remedies of parties under a statutory charge over land. Section 256(2) of the NLC provides:
>
> > Any application for an order for sale, under this Chapter by a charge of any such land or lease shall be made to the Court in accordance … (emphasis added)
>
> Clearly, the section provides a prescribed method of sale to be undertaken by a chargee not a chargor. In the instant appeal, however, the sale was undertaken by the R & M on behalf of the first respondent, the chargor of the said lease. In our view, the provisions of NLC prescribing for judicial sale could not apply to the facts in the instant appeal because the R & M was acting as agent of the chargor.

(b) There is no issue of void or insufficient instrument as the memorandum of transfer was executed by the 1st defendant as the donee of an irrevocable Power of Attorney. The Power of Attorney contains the empowering clause, that reads:

> 9. To sell to any person all or any of my lands, leases and charges and movable property whether now belonging to me or which shall hereinafter belong to me and for that purpose to sign and execute all transfers and other instruments necessary.

(c) That the late payment of stamp duty on the Power of Attorney and the Sale and Purchase Agreement between the plaintiff and the 1st defendant does not affect the validity and admissibility of the documents. This is covered by ss. 51, 52 and s. 63 of the Stamp Act 1949. On this point it is suffice to refer to the case of *Malayan Banking Bhd v. Agencies Bureau Sdn. Bhd. & Ors* [1982] CLJ 66; [1982] CLJ (Rep) 217.

(d) On alleged fraud, there is not an *iota* of evidence to show any inkling of fraudulent act or omission by the 3rd and 4th defendants. They are innocent purchasers of the land. In any event, mere knowledge of the existence of a charge could not reasonably be inferred as part of a fraudulent act. See *Pekan Nenas Industries Sdn. Bhd. v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793, where the Federal Court at p. 854, held that:

> In *Waimiha Sawmilling*'s case (at p. 106), the Judicial Committee of the Privy Council adopted the words of the New Zealand Court of Appeal in *Fels v. Knowles* [1906] 26 NZLR at p 620 where it said:
>
> > Everything which can be registered gives, in absence of fraud, an indefeasible title to the estate or interest or in the cases which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.
>
> We would, therefore, answer the question posed under question (1) by saying that mere knowledge of the existence of an unregistered claim or interest in land may not amount to fraud unless it is demonstrated that there has been a deliberate and dishonest attempt to deprive the unregistered claimant of his claim or interest therein. (See *Loke Yew v. Port Swettenham Rubber Co Ltd* [1913] AC 491 (Privy Council.)

(e) At the trial in the High Court, two advocates and solicitors, namely SP3 and SP4 gave evidence for the defendants and confirmed the execution of the relevant documents pertaining to the transactions over the land and the consequential transfer of the land to the 3rd and 4th defendants.

(f) The evidence at the trial clearly showed that the facts does not fall within the exceptional circumstances as envisaged under s. 340(2) of the National Land Code. On the other hand, in any event, the 3rd and 4th defendants' acquisition of the title and interest on the land is well protected by the proviso to s. 340(3) of the National Land Code. The 3rd and 4th defendants are purchasers in good faith and for valuable consideration of which such consideration has been paid in full. In short, the 3rd and 4th defendants, had in law, upon being registered as proprietors, acquired an indefeasible title and interest to the land.

Conclusion

[21] From the above findings, we conclude that the learned trial judge has erred when he made his decision by using the wrong standard of proof in the factual matrix of the case when fraud was specifically pleaded. Such an error is a serious misdirection that affects the outcome of the case. Furthermore, from our scrutiny of the evidence as adduced at the trial, the documentary and oral evidence are all in favour of the 3rd and 4th defendants.

[22] As stated earlier, on the facts and by operation of law, the 3rd and 4th defendants are conferred with indefeasible title and interest to the land in dispute. There is not a shred of evidence to show otherwise. There is no evidence to indicate any element of dishonesty or wilful act on the part of the 3rd and 4th defendants that can paint a picture of any sort of fraudulent act that could be illustrative of fraud as observed by Raja Azlan Shah CJ (as HRH then was) in the Federal Court case of *PJTV Denson (M) Sdn. Bhd. & Ors v. Roxy (Malaysia) Sdn. Bhd.* [1980] 1 LNS 55.

[23] As a parting note and capitulation, it may be appropriate to state the law on the subject matter and also to touch briefly on the burden of proof. Such note, can no better be expressed then as stated by the then Lord President, Tun Suffian in *Saminathan v. Pappa (supra)* who had this to say (at p. 122):

A Now as to the law, it is clear from s. 340 of the National Land Code that the plaintiff's title to the land in dispute is indefeasible, but it may be defeated in case of fraud or misrepresentation to which she was a party or where registration was obtained by means of an insufficient or void instrument.

B …

And at p 123:

As the plaintiff's name is on the register and the defendant wanted it removed, in my judgment the burden is on the C defendant to prove fraud or misrepresentation to which the plaintiff was a party, or that the registration of the plaintiff as proprietor was obtained by means of an insufficient and void instrument.

D As regards fraud, the defendant must prove it not on a balance of probabilities but beyond reasonable doubt: see the Privy Council case of *Narayanan*.

[24] In such circumstance, without any hesitation, we are unanimous in our decision to allow the appeal. The appeal is E allowed with costs. The Orders of the High Court is hereby set aside, and consequential to that the names of the 3rd and 4th defendants are to be restored as the registered proprietors of the land. Costs is fixed at RM12,000 and the appeal deposit is to be refunded to the 3rd and 4th defendants.

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